

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JENNIFER DOMBKOWSKI</b>	)	
Claimant	)	
VS.	)	
	)	
<b>IBP, INC.</b>	)	Docket Nos. 177,397,
	)	195,846 & 195,847
Respondent	)	
Self-Insured	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant appeals from the Awards entered in the above three docketed claims by Administrative Law Judge Floyd V. Palmer on August 1, 1996. The Appeals Board heard oral argument February 6, 1997. Board Member Gary M. Korte recused himself, and Stacy A. Parkinson has participated in his place as a Board Member Pro Tem.

**APPEARANCES**

Diane F. Barger of Wichita, Kansas, appeared on behalf of claimant. Tina M. Sabag of Dakota City, Nebraska, appeared on behalf of respondent, a qualified self-insured. Derek R. Chappell of Ottawa, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed and considered the record identified in the Award. The Appeals Board has also considered the letter from P. Brent Koprivica, M.D., dated September 14, 1995.

**ISSUES**

The Administrative Law Judge denied claimant's request for benefits in both Docket Nos. 177,397 and 195,846. For Docket No. 177,397, a claim for injury to the left shoulder, upper back, and cervical spine on March 10, 1993, the Administrative Law Judge found claimant had failed to sustain her burden to establish that the injuries arose out of and in the course of claimant's employment. The Administrative Law Judge so found in part because of testimony claimant gave in a separate case pending in the District Court of Lyon County, Kansas, Dombkowski v. Nunez, Case No. 93-D-70. In that separate case, claimant testified injuries such as those alleged in Docket No. 177,397 resulted from an altercation with her boyfriend.

On appeal, claimant contends the Administrative Law Judge erred in extending the terminal dates to allow respondent to submit a transcript of the separate proceedings in the Lyon County District Court. Claimant also contends the transcript is otherwise inadmissible as evidence in this workers compensation case. Claimant asks the Appeals Board to remand this case for decision by the Administrative Law Judge based upon all other evidence introduced but excluding the transcript of the proceedings in the Lyon County District Court.

In Docket No. 195,846, a claim for bilateral injuries to the hands and wrists on June 7, 1994, the Administrative Law Judge denied benefits on the grounds that claimant failed to give timely notice as required by K.S.A. 44-520. Claimant asks the Appeals Board to reverse this finding, find the case compensable, and render a decision on the nature and extent of claimant's disability.

In Docket No. 195,847 the Administrative Law Judge granted benefits based upon a five percent permanent partial general disability for a low-back injury claimant alleges occurred on June 21, 1994. Claimant asks the Appeals Board to review the finding regarding nature and extent to award benefits based upon a higher work disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be affirmed in Docket No. 177,397, reversed in Docket No. 195,846 and affirmed in Docket No. 195,847. Each case will be discussed separately.

**Docket No. 177,397**

As above indicated, in Docket No. 177,397 claimant alleges injury to her left shoulder, upper back, and cervical spine on March 10, 1993. She testified the injury occurred when she pulled a bone off the bone line and felt a pop and sharp pain in her left shoulder. The Administrative Law Judge found that claimant failed to sustain her burden

of proving that she suffered permanent injury arising out of and in the course of her employment. In the Award, he reviews in detail evidence that claimant suffered injury to her neck, shoulder, and left upper extremity first in an automobile accident on January 26, 1992, unrelated to her employment, and then to her left arm again in an automobile accident in February 1992, also unrelated to her employment. Finally, the Administrative Law Judge emphasizes testimony given by the claimant at a hearing held in the case of Dombkowski v. Nunez, Case No. 93-D-70 in the District Court of Lyon County, Kansas. At a hearing held in that case on April 9, 1993, approximately a month after her alleged injury at work, claimant testified that she injured her shoulder and an arm on March 7, 1993, three days before the alleged injury at work, in an altercation with her boyfriend. In her testimony, she did not mention injury to her shoulder at work.

Claimant contends that the Administrative Law Judge erred in considering the testimony from the proceedings in Lyon County District Court because they were submitted after the initial terminal dates and because, according to claimant, the transcript of those proceedings is otherwise inadmissible. The Administrative Law Judge entered an Order dated July 19, 1996, in which he denied claimant's Motion to Quash Transcript of the Lyon County District Court proceeding, granted respondent's motion for an extension of terminal dates, and agreed to consider the transcript of the proceedings in the Lyon County District Court. In the Award from which claimant now appeals, the Administrative Law Judge found that the testimony in the Lyon County District Court substantially contradicts claimant's testimony in this case. On the basis of that testimony, the Administrative Law Judge found claimant had failed to sustain her burden of proving that her injury arose out of and in the course of her employment and denied benefits. The Appeals Board agrees both with the decision to consider the evidence and with the finding that the claim is not compensable.

First, the Appeals Board agrees with the decision to extend terminal dates and consider the transcript of the Lyon County District Court proceedings. The Administrative Law Judge initially set claimant's terminal date as July 15, 1995, respondent's as August 14, 1995, and the Workers Compensation Fund as August 29, 1995. On September 8, 1995, respondent sent a letter requesting permission to submit the transcript of the proceedings in Lyon County District Court. On November 7, 1995, claimant sent a letter objecting to this submission. On February 6, 1996, claimant filed a Motion to Quash Transcript. On February 14, 1996, respondent filed its motion objecting to the motion to quash and asked for extension of terminal dates. The Administrative Law Judge entered his Order on July 19, 1996, extending the terminal date and admitting the transcript into evidence.

The Appeals Board agrees with the Order by the Administrative Law Judge. The transcript of the proceedings would not have been a surprise to claimant or her counsel. In addition, admission of the transcript did not in any way delay this case. Claimant made the request to submit the transcript shortly after the last terminal date. Finally, the interest of justice encourages admission of relevant evidence. For these reasons, the Appeals

Board finds there was good cause for extending the terminal date as contemplated by K.S.A. 1992 Supp. 44-523(b)(4).

The Appeals Board also concludes that the transcript of the District Court proceedings should be otherwise admissible. Claimant argues, in effect, the transcript can only be admitted under Chapter 60, specifically 60-460(c) and (g), and Chapter 60 does not apply to workers compensation proceedings. The Appeals Board agrees Chapter 60 generally does not apply. However, this does not prevent the Administrative Law Judge from admitting the transcript. Workers compensation proceedings are not controlled by strict rules of evidence. Evidence is more liberally admitted in workers compensation proceedings. See Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). The transcript offered purports to be certified by the court reporter as a correct transcription of an official tape recording of the proceeding. Claimant's counsel did not request additional time for rebuttal of either the substance of the testimony or the authenticity of the transcript.

Finally, the Appeals Board agrees with the conclusion that the claimant has failed to sustain her burden to show the injury arose out of and in the course of her employment. First, the record suggests claimant suffered injury to her shoulder, arm, and neck in two previous automobile accidents. She suffered a spiral fracture to the humerus and damage to the radial nerve in her left arm in an automobile accident on January 26, 1992. In a second automobile accident in February 1992, claimant again injured her left arm. Shortly after the second car accident, claimant had increased pain in her left shoulder, neck, and back. Her left arm and shoulder were essentially unused for six to seven months before she began physical therapy. When she began physical therapy, her neck and shoulder pain worsened.

As indicated, claimant also testified to shoulder injuries suffered in an altercation with her boyfriend on March 7, 1993. At a hearing held on April 9, 1993, she testified that the injury occurred some three days before the alleged injury at work. She made no mention of an injury at work.

Dr. James N. Glenn, M.D., one of the physicians who treated claimant for injuries suffered in the automobile accident, testified to his opinion that the March 10, 1993, alleged accident at work resulted in a muscular injury by which claimant should recover. Dr. Glenn did not have the history of the assault and battery from claimant's boyfriend. Dr. P. Brent Koprivica, M.D., attributed some permanent injury to the March 10, 1993 occurrence at work, and he also did not have the history of injury by the boyfriend. The Administrative Law Judge found, and the Appeals Board agrees, that the testimony given in the separate proceedings in Lyon County District Court impeached claimant's credibility. The testimony also renders the medical opinions unreliable. Claimant also initially testified in a way which minimized the injuries suffered in the automobile accident. The Appeals Board finds and concludes that claimant has not established by a preponderance of the credible evidence that her injury arose out of and in the course of her employment.

**Docket No. 195,846**

In Docket No. 195,846, claimant seeks benefits for alleged bilateral hand and wrist injuries. The Administrative Law Judge denied benefits on the grounds claimant had failed to give timely notice as required by K.S.A. 44-520. For the reasons stated below, the Appeals Board concludes that the decision on this claim should be reversed.

Claimant was off work from July of 1993 until April of 1994 for treatment with Lowry Jones, Jr., M.D., and Joseph G. Sankoorikal, M.D. When she returned in April of 1994, respondent assigned her to a job where she trimmed contamination using a hook and knife. Claimant testified that her shoulder began hurting immediately, and she then began experiencing pain in her hands and wrists.

Claimant testified that she reported her hand and wrist pain problems to the nurse in the dispensary on an almost daily basis. The Administrative Law Judge noted claimant's credibility had been impeached. He also states that the first documented evidence that claimant gave notice was a note from the company nurse dated June 21, 1994.

The Appeals Board finds, however, claimant did give timely notice. First, claimant testified she notified the dispensary on a daily basis, and this testimony is essentially uncontradicted. The evidence does not include records from the dispensary with the exception of the single referenced note of June 21, 1994. The note of June 21, 1994, is a note from the company nurse which claimant testifies she was asked to give her supervisor. The note describes claimant's symptoms, including tingling bilaterally in the fingers, and requests the recipient of the note see the company nurse. The date of the note also coincides with the date of the low back injury which is the subject of Docket No. 195,847. The evidence does not include the testimony of the nurse or other records which might shed light on when claimant first gave notice. Under these circumstances, we do not find claimant's own testimony so lacking in credibility that it should be completely disregarded.

In addition, the evidence shows that claimant's bilateral hand and wrist injuries occurred during a period which extends through August of 1994. Dr. Koprivica describes them as beginning in April of 1994 and continuing until she left employment in August of 1994. The Appeals Board finds the last date claimant worked, August 12, 1994, should be treated as the date of accident. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). Respondent clearly had notice by June 21, 1994, the date of the nurse's note, and earlier according to claimant's testimony.

The March 8, 1995, report from Dr. Koprivica, the independent medical examiner, provides the only rating of functional impairment for claimant's bilateral wrist and hand injury. He diagnoses tendonitis and mild carpal tunnel syndrome. He also notes the preexisting radial nerve damage from claimant's automobile accident. Excluding the radial

nerve damage, he rates claimant's disability as a 6 percent general body disability and recommends claimant avoid repetitive pinching, grasping, and wrist flexion and extension. The Appeals Board concludes that claimant should be awarded benefits in Docket No. 195,846 based upon a 6 percent general body disability from the bilateral hand and wrist injuries.

The Appeals Board finds claimant has failed to sustain her burden to prove a higher work disability. Claimant contends that she left employment because of her injuries. Claimant submitted a typewritten statement so stating at the time she terminated her employment. The evidence also indicates that shortly thereafter she began studies at Emporia State University where she achieved a bachelor's degree in business administration in the spring of 1995.

Claimant introduced vocational testimony regarding claimant's loss of ability to obtain employment in the open labor market. However, for accidents after July 1, 1993, K.S.A. 44-510e defines work disability in terms of loss of ability to perform tasks. That statute also requires that the loss of ability to perform tasks be based upon the opinion of a physician. The record in this case contains no opinion of a physician which establishes the tasks loss. Claimant's counsel points to the letter from Dr. Koprivica dated September 14, 1995. However, Dr. Koprivica indicates he cannot give an opinion regarding tasks loss and does not agree with the opinion expressed by the vocational expert, Bud Langston.

It also appears from the evidence that the injury which led to claimant's decision to terminate her employment was the injury to her shoulder, the injury the Board finds was not from claimant's work. Finally, claimant left her employment without responding to the offer by respondent to accommodate her injuries. The company nurse testified she advised claimant not to work in violation of any medical restriction and requested that claimant notify her if any job duties violated her restrictions. Claimant terminated her employment without giving any notice to the company nurse that she considered the work to be in violation of her restrictions.

The Appeals Board concludes claimant should be limited to benefits based on the 6 percent functional impairment only.

#### **Docket No. 195,847**

In Docket No. 195,847, claimant seeks benefits for a low-back injury on June 21, 1994. The Administrative Law Judge awarded benefits for the low-back injury noting there was no evidence of back injury in the automobile accidents or other explanation for the documented low-back problems. Claimant attributes the back problems to work on the skinner machine. This work required that she twist and bend her back. The complaints are documented in the note of the plant nurse dated June 21, 1994. Dr. Koprivica again provides the only testimony regarding the functional impairment for the

low-back injury. He assigns a 5 percent whole body impairment for the low-back injury. The Administrative Law Judge awarded benefits based upon that rating by Dr. Koprivica, and the Appeals Board agrees.

The decision to award benefits in two claims raised additional questions regarding average weekly wage. The Administrative Law Judge found an average weekly wage of \$435.36 for the Docket No. 195,847 (back injury) with the June 21, 1994 date of accident based on the evidence submitted by claimant. The parties have not, on appeal, disputed this finding. Claimant's evidence also indicates an average weekly wage of \$432.86 for Docket No. 195,846 and, on the basis of that evidence, the Appeals Board finds the wage to be \$432.86.

### **AWARD**

#### **Docket No. 177,397**

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Floyd V. Palmer, dated August 1, 1996, should be, and is hereby, affirmed.

An award is entered in favor of the respondent, self-insured, and the Kansas Workers Compensation Fund and against the claimant, Jennifer Dombkowski, that the claimant take nothing against the respondent, self-insured, and the Kansas Workers Compensation Fund as a result of her claim.

The Kansas Workers Compensation Fund shall reimburse the respondent, self-insured, 60 percent of all amounts previously paid and expenses in this claim pursuant to stipulation, agreement, and order.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent, self-insured, as set forth in the award of the Administrative Law Judge for Docket No. 195,847.

#### **Docket No. 195,846**

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Floyd V. Palmer, dated August 1, 1996, should be, and is hereby, reversed.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Jennifer Dombkowski, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred August 12, 1994, and based upon an average weekly wage of \$432.86 for 24.9 weeks at the rate of \$288.59 per week or \$7,185.89, for a 6%

permanent partial general disability all of which is due and owing and shall be paid in one lump sum less amounts previously paid.

**Docket No. 195,847**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Floyd V. Palmer, dated August 1, 1996, should be, and is hereby, affirmed

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Jennifer Dombkowski, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred June 21, 1994, and based upon an average weekly wage of \$435.36 for 20.75 weeks at the rate of \$290.25 per week or \$6,022.69, for a 5% permanent partial general body disability all of which is due and owing and is therefore ordered paid in one lump sum less amounts previously paid.

The Appeals Board approves and adopts as its own the orders by the Administrative Law Judge relating to future medical expenses, unauthorized medical expenses, attorneys fees, and expenses of administration.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Tina M. Sabag, Dakota City, NE  
Derek R. Chappell, Ottawa, KS  
Floyd V. Palmer, Administrative Law Judge  
Philip S. Harness, Director